Pantai Mentiri Golf Club v Borneo Landscaping & Grassing (B) Sdn Bhd

COURT OF APPEAL (BRUNEI DARUSSALAM) — CIVIL APPEAL NO 12 OF 2009
MORTIMER PCA, DAVIES AND ROGERS JJCA
27 MAY 2010

Land Law — Tenancy — Vacant possession, claim for — Whether landlord entitled to terminate tenancy because tenant erected fence — Landlord dumping rubbish on part of land leased to tenant — Whether tenant entitled to deduct cost of removing rubbish as set off or counterclaim when paying rent

Landlord and Tenant — Lease — Determination of — Whether landlord entitled to terminate tenancy because tenant erected fence

Landlord and Tenant — Rent — Set off — Landlord dumping rubbish on part of land leased to tenant — Whether tenant entitled to deduct cost of removing rubbish as set off or counterclaim when paying rent

The appellant had leased a driving range ('the premises') to the respondent. The appellant subsequently terminated the tenancy and commenced an action for vacant possession of the premises. The appellant claimed that the respondent had breached the tenancy by: (i) bringing liquor into the premises; and (ii) erecting a barbed wire fence on the premises. The appellant also complained that the respondent had wrongly set off the costs of clearing rubbish from the premises against the rental payable. At first instance, the magistrate held that the respondent had been in breach of the tenancy, entitling the appellant to vacant possession. The High Court reversed. The appellant appealed to the Court of Appeal.

Held, dismissing the appeal with costs:

(1) Clearly, the appellant was responsible for the dumping of the rubbish. The respondent was entitled to take whatever action necessary to remove what was a gross breach of its rights as a tenant. The respondent had a valid counterclaim against the appellant and was entitled to deduct the costs of clearing the rubbish as a counterclaim from the rent due to the appellant. The appellant had incurred a liability which could be relied upon by the respondent as a set off irrespective of whether the respondent had raised the matter as a counterclaim (see paras 17–18); *British Anzani*

(Felixstowe) Ltd v International Marine Management (UK) Ltd [1980] QB 137 referred; *Waters v Weigall* (1795) 2 Anst 575; (1795) 145 ER 971 referred.

(2) The fence was something which could be easily removed. The fence was more of a temporary item rather than a substantial fixture. The appellant had failed to adduce sufficient evidence to establish that the erection of the fence was a matter that would give it the right to terminate the tenancy (see para 19).

[Bahasa Malaysia summary

Perayu telah memajak kawasan draif ('premis tersebut') kepada responden. Perayu kemudian menamatkan penyewaan tersebut dan memulakan tindakan untuk milikan kosong bagi premis tersebut. Perayu mendakwa bahawa responden telah mengingkari penyewaan tersebut dengan: (i) membawa masuk minuman keras ke dalam premis; dan (ii) membina pagar kawat berduri di premis tersebut. Perayu juga mengadu bahawa responden telah dengan salah menolak kos untuk membersihkan sampah sarap dari premis tersebut daripada sewa yang harus dibayar. Pada mulanya, majistret memutuskan bahawa responden telah mengingkari penyewaan tersebut, yang mana melayakkan perayu untuk milikan kosong. Mahkamah Tinggi telah mengakas. Perayu telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Jelas sekali perayu bertanggungjawab untuk pembuangan sampah sarap tersebut. Responden mempunyai hak untuk mengambil sebarang tindakan yang perlu untuk membersihkan apa yang dianggap suatu pelanggaran haknya sebagai penyewa yang melampau. Responden mempunyai tuntutan balas yang sah terhadap perayu dan mempunyai hak untuk menolak kos pembersihan sampah tersebut daripada sewa yang dibayar kepada perayu sebagai tuntutan balas. Perayu telah dikenakan liabiliti yang mana boleh diguna pakai oleh responden sebagai tolakan tidak kira sama ada responden telah membangkitkan perkara tersebut sebagai suatu tuntutan balas (lihat perenggan 17–18); *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137 dirujuk; *Waters v Weigall* (1795) 2 Anst 575; (1795) 145 ER 971 dirujuk.

(2) Pagar tersebut merupakan sesuatu yang boleh dialihkan dengan mudah. Pagar tersebut lebih dianggap sebagai barangan sementara daripada suatu lengkapan yang substansial. Perayu gagal untuk mengemukakan keterangan yang mencukupi untuk membuktikan bahawa pembinaan pagar tersebut merupakan perkara yang boleh memberikannya hak untuk menamatkan penyewaan tersebut (lihat perenggan 19).]

Notes

For a case on set off, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1370.

For cases on claim for vacant possession, see 8(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4747–4750.

For cases on lease generally, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1108–1149.

Cases referred to

British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd [1980] QB 137 (refd)

Waters v Weigall (1795) 2 Anst 575; (1795) 145 ER 971 (refd)

Rudi Lee Kim Boon (Shamila with him) (Fathan Rudi Lee Annie Kon & Associates) for the appellant.

Sivabalan (Sankaran Halim) for the respondent.

Rogers JCA:

[1] This was an appeal from a judgment of Judicial Commissioner Findlay given on 17 September 2009. The matter before the judge was an appeal from a decision of the magistrate in respect of a claim by the appellant, Pantai Mentiri Golf Club, to obtain vacant possession of a driving range ('the premises') that had been leased by the appellant to the respondent, Borneo Landscaping & Grassing (B) Sdn Bhd. The magistrate had ordered the respondent to restore the premises and to deliver up the premises within 60 days in good condition. In addition the magistrate ordered the respondent to pay mesne profits, to be calculated at double the agreed rental, from July 2008 until the date that vacant possession was given. On appeal the judicial commissioner allowed the respondent's appeal. At the conclusion of the hearing of this appeal, this court reserved judgment which we now give.

BACKGROUND

[2] On 24 September 2004 the respondent entered a tenancy agreement with the appellant in respect of the premises for a period of six years from 1 August 2004 to 31 July 2010. The rent was to be $24,000 per year for the first three years, $30,500 per year for the fourth and fifth years and for the final year it was to be $36,000. On 17 March 2007 the officers from the Royal Customs and Excise Department together with the officers from the police department raided the premises and discovered ten cans of beer. Based on that, on 29 November 2007 the appellant's solicitors gave notice to the respondent that the tenancy was terminated with immediate effect and gave notice to quit. The respondent vehemently denied that it had been in breach.

[3] On 27 May 2008 the respondent's solicitors wrote to the appellant complaining of the dumping of rubbish, described in the letter as debris/rubbish, around the edge of the driving range. The appellant was requested to remove the rubbish within seven days. That was followed by a letter of 9 June 2008 wherein the respondent's solicitors complained that nothing had been done to redress the problem of the rubbish and stated that the respondent would itself undertake to clear the rubbish and estimated that it would cost $580 per day to do so. That correspondence was met with a letter of 11 June 2008 from the appellant's solicitors stating that the tenancy had been terminated and the notice to quit had been served. Finally, on 6 July 2008 the respondent sent a letter to the appellant enclosing a cheque for $12,700 which was calculated to be the rental for the period of July 2008 to June 2009 based on a rent of $2,500 per month less the costs of maintenance of the grass area of the driving range calculated at $1,200 per month and the costs of five days clearing the rubbish amounting to $2,900.

[4] There the matter remained and the present proceedings were commenced. The appellant's complaints in the amended statement of claim were first that the respondent had permitted alcohol to come onto the premises and second that the respondent had purported to set off the costs of clearing the rubbish against the annual rental for the period of 2008–2009.

THE PROCEEDINGS IN THE MAGISTRATE'S COURT

[5] For reasons which it is unnecessary to expound, the magistrate was not satisfied that the respondent had been responsible for bringing the alcohol which had been found on the premises. She said that she remained unsatisfied that the respondent had committed an illegal act as alleged. Furthermore, she considered that the notice of termination of the tenancy agreement was defective and was bad in law for being too short and that the notice to quit was, therefore, invalid.

[6] In relation to the complaints in respect of the deduction of the costs of removing the rubbish, the appellant's case was, initially, that the respondent could not deduct any costs whether they be for clearing the rubbish or for the maintenance of the grass area. Eventually, the appellant was put in a position where it had to concede that the costs of the maintenance of the grass area could be deducted from the rent because there had been correspondence to that effect, culminating in a letter of 15 December 2006 from the appellant agreeing to the deduction.

[7] As regards the deduction of the costs of clearing the rubbish the appellant's case was, first, that it had informed a Mr Pg Hassanal of the fact that it would itself clear the rubbish when the weather and condition of the ground

permitted it and, second, that, in any event, the respondent could not deduct any such costs because the costs of removal of the rubbish was something quite different from the rent.

[8] The magistrate upheld the appellant's contention. She held that the respondent was in breach of its obligation to pay rent by deducting the costs of removing the rubbish. Furthermore, she held that the appellant was not liable to pay the costs of removal because it had intended to clear the rubbish itself. Finally on this aspect, although it had been suggested that the appellant's new chairman was unhappy with the respondent and wanted to terminate the tenancy, the magistrate found no merit in the respondent's allegation that the appellant had dumped the rubbish maliciously.

[9] In addition to the above, the appellant had raised in the affidavit evidence an allegation that the respondent had been in breach of cl 5(v) of the tenancy agreement by erecting a barbed wire fence. The magistrate acknowledged that this matter had not been pleaded in the amended statement of claim but considered that it could not be denied that the respondent had been in breach of cl 5(v) which read:

> The Tenant hereby agrees and covenants with the Landlord as follows:
>
> ...
>
> v Not without the previous consent in writing of the Landlord which consent Shall not be unreasonably withheld to erect, make or permit or suffered to be erected or made any alterations or additions to the premises or in the layout or arrangement of the premises PROVIDED ALWAYS that all costs and expenses for such alterations or additions to the premises if so consented in writing by the Landlord are to be borne any(sic) payable solely by the Tenant and that the premises be restored to its original condition at the expiration or similar termination of this agreement.

[10] The magistrate came to the conclusion that the erection of a barbed wire fence was in contravention of the tenancy agreement and, on that basis, held that the respondent had been in breach and for that reason also, the appellant was entitled to vacant possession.

THE APPEAL TO THE HIGH COURT

[11] When the matter came before the High Court there was a procedural issue which is now no longer relevant. The appellant, furthermore, did not pursue the matter in relation to the alcohol. The appellant, however, maintained its position in relation to both the deduction of the costs of clearing the rubbish and also the erection of the fence.

[12] As regards the rubbish, the judge came to the conclusion that the respondent had been entitled to deduct the costs of removal of the rubbish from the rental payment. He considered the evidence both of the respondent's witness, Emanuel Cruz Teleg, who had pointed out that not only was the appellant responsible for the rubbish but that its servants had continued to dump rubbish including plastic, wood and kitchen waste as late as 11 June, at the same time as the respondent was attempting to clear it. The judge examined photographs which had been taken on that occasion. On that basis he had no difficulty in coming to the conclusion that by dumping the rubbish the appellant was in breach of its obligations as landlord and the respondent was entitled to cure that as best it could. In the circumstances, it was entitled to deduct the costs of removing the rubbish from the rent and it had not been in breach of the tenancy.

[13] On the matter of the erection of the fence, the judge first of all remarked that not only was the matter not pleaded but the issue 'had been hardly aired at all'. It had been referred to in the affidavit of Jaidin bin Hj Berudin. He went on to say that 'no one seems to have mentioned or examined this allegation at all'. He considered that it was stretching things beyond reasonableness to find that a fence, which, from the photographs, was clearly an easily removable, temporary thing, was an alteration or addition to the premises within the meaning of cl 5(v) of the tenancy agreement. He went on to say that under cl 9(iii) of the tenancy agreement the respondent had the right to install fittings and equipment. He regarded an easily removable fence of the type in question as being in the nature of a fitting rather than an alteration. Importantly the judge concluded his assessment of this aspect by saying:

> Further, even if it could be said that the erection of the fence was a breach of the lease, it cannot be said to be so fundamental as to amount to a breach of a condition. At most, I find that the respondent would have been entitled only to damages, not the right to terminate.

[14] In those circumstances, the judge came to the conclusion that the respondent had not been entitled to terminate the tenancy agreement and gave judgment accordingly.

THIS APPEAL

[15] On this appeal Mr Lee, who appeared on behalf of the appellant, argued that the judge had been wrong to 'lump' the question of the costs of the removal of the rubbish together with the payment of rent. His argument was that the provisions of cll 4 and 5(i) were to the effect that rent should be paid yearly in advance and did not permit any deduction whether of a counterclaim or set off. The payment of rent and the counterclaim for the wrongful dumping of

rubbish by the landlord were two separate matters and that the tenancy agreement did not provide, in any way, for deductions of any sort. His argument was that by deducting the costs the respondent had acted in a way which was a unilateral variation of the tenancy agreement and that was not permissible. In written submissions he also said that the judge's finding of malice was in error and that the judge had not given proper weight to the appellant's evidence that the appellant was intending to clear the rubbish when the weather and ground conditions permitted it.

[16] In relation to the fence, Mr Lee argued that the matter had been sufficiently aired. He referred to the fact that Mr Emanuel Cruz Teleg had, indeed, exhibited photographs which he had taken and that that had been clearly in response to the appellant's evidence. It was said that it was wrong for the judge to have held that the matter had been hardly aired at all. Part of his argument was that there was no basis for the judge to hold that the erection of the fence was in order to prevent the dumping of the rubbish. As regards cl 9(iii) of the tenancy agreement which referred to the respondent being entitled to install 'furniture fitting and equipment', the argument was that the judge had misinterpreted that and should have considered the clause as referring to 'furniture fitting' rather than 'fitting'.

[17] It is clear that the appellant must have been responsible for the dumping of the rubbish. As the judge noted, the fact that rubbish of that nature was dumped, apparently on the area leased to the respondent, was a matter which called for an explanation. That explanation has never been given. Clearly the respondent was entitled to take whatever action was necessary to remove what was a gross breach of its rights as a tenant. As such the respondent had a valid counterclaim against the appellant and was entitled to deduct the amount as a counterclaim from the rent due to the appellant.

[18] In relation to the point that the rent and the costs of removal of the rubbish were separate matters, it can be observed that there is no suggestion that rent does not remain payable. The matter is simply that the respondent is entitled to the costs of removal of the rubbish; by its breach of its obligation as a landlord the appellant had created a situation which the respondent was entitled to take steps to rectify and the costs involved could be recovered from the appellant, as the landlord. Therefore, the appellant had incurred a liability which could be relied upon by the tenant as a set off irrespective of whether the tenant raised the matter as a counterclaim: see for example the decision in *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137 and the analysis of the previous authorities starting with the case of *Waters v Weigall* (1795) 2 Anst 575; (1795) 145 ER 971 and the cases which have followed thereafter. The position is also set out in the passage in the *Halsbury's Laws of England*, Vol 27(2) at para 234.

[19] The allegation that the fence was a breach of the tenancy agreement was contained in the affidavit of Jaidin bin Hj Berudin sworn on Thursday 9 October 2008; the trial before the magistrate commenced the following Monday 13 October 2008. Whether as a result of the lateness of the introduction of the allegation or for some other reason, the evidence in relation to it was, as the judge said, sparse to say the least. The matter hardly features in the evidence and the best that could be referred to were photographs produced by the respondent. The extent and location has as a result not been established. It would appear to be something which could be easily removed. It may be said that what can be seen in the photographs, is that the fence was more in the nature of a temporary item rather than a substantial fixture. On the evidence adduced in relation to it, it is far from established that the erection of the fence was a matter which would give the appellant the right to terminate the tenancy. The judge's conclusion as quoted in para 13 above can thus not be faulted. On that basis the appellant's complaint must fail.

CONCLUSION

[20] This appeal, therefore, falls to be dismissed. There should be an order that unless application is made before 1 June 2010 there will be an order of costs in favour of the respondent.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon